

In the Matter of the Compensation of  
**MARGARETT Y. INTERIANO, Claimant**  
WCB Case Nos. 18-01113, 15-05067, 15-02779, 14-03713  
**ORDER ON REMAND**  
Julene M Quinn LLC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

This case is before us on remand from the Court of Appeals. *Interiano v. SAIF*, 315 Or App 588 (2021). The court has reversed that portion of the Board's order, *Margarret Y. Interiano*, 71 Van Natta 111 (2019), that affirmed an Administrative Law Judge's (ALJ's) order that upheld the SAIF Corporation's denial of claimant's December 2014 injury claim for a low back condition. Reasoning that a preexisting condition and its symptoms are not separate conditions, the court held that the Board erred in determining that claimant had a "combined condition" within the meaning of ORS 656.005(7)(a)(B). Accordingly, the court has reversed that portion of the Board's order and remanded for further proceedings. Having received the parties' supplemental briefs, we proceed with our review.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized and supplemented below.

Claimant testified that in December 2014, she performed increased work activity beyond her restrictions due to inclement weather. (Tr. 28-31).

In August 2015, claimant filed a claim for a December 2014 injury for a low back condition, which SAIF denied. (Exs. 73, 80). Claimant timely requested a hearing regarding SAIF's denial.

CONCLUSIONS OF LAW AND OPINION

In upholding SAIF's denial of claimant's 2014 injury claim, the ALJ found that SAIF had conceded that claimant had met her burden to prove that her December 2014 work injury was a material contributing cause of her need for treatment and disability for her low back condition. Nevertheless, the ALJ determined that the medical evidence established that claimant had a "combined condition," and that the December 2014 work injury was not the major

contributing cause of the disability or need for treatment for her combined low back condition. See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010).

On Board review, we affirmed that portion of the ALJ's order.<sup>1</sup> *Interiano*, 71 Van Natta at 111. Finding that SAIF had established a "combined condition," and that the major contributing cause of the need for treatment or disability of the combined condition was not the "otherwise compensable injury," we concluded that SAIF had met its burden of proof. *Id.* at 114-15.

On judicial review, the court reversed our order concerning claimant's 2014 injury claim for a low back condition. *Interiano*, 315 Or App at 589. Relying on *Carrillo v. SAIF*, 310 Or App 8, 12, *rev den*, 368 Or 560, 494 (2021), the court reiterated that the "term 'combined condition' suggests two separate conditions that combine." *Interiano*, 315 Or App at 594. Because we found that claimant's preexisting spondylosis arthritic condition had combined with the symptoms of that condition when she was lifting at work in December 2014, the court determined that we erred in concluding that claimant had two separate conditions that combined within the meaning of ORS 656.005(7)(a)(B). *Id.* at 594-95.

On remand, SAIF concedes the compensability of claimant's December 2014 injury claim for a low back condition. Accordingly, we reverse the ALJ's order and set aside SAIF's denial of claimant's December 2014 injury claim.<sup>2</sup>

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<sup>1</sup> We also affirmed those portions of the ALJ's order that: (1) upheld SAIF's denial of claimant's new/omitted medical condition claim for a left L5 radiculopathy and an L4-5 herniated disc; (2) upheld SAIF's denial of claimant's aggravation claim for a left lumbar strain condition; (3) upheld SAIF's denial of an occupational disease claim for a low back condition; and (4) found that a proposed left L5-S1 laminectomy was not compensably related to claimant's November 2013 injury. Those issues are not before us on remand.

<sup>2</sup> Claimant asserts that we must order SAIF to accept her preexisting arthritic condition as a result of its compensability concession regarding her low back injury claim, as well as the procedural posture of the case. Yet, for an initial injury analysis, the law does not require a claimant to establish a specific diagnosis; rather, a claimant must prove that a work injury/incident was a material contributing cause of the need for treatment or disability. See ORS 656.005(7)(a); ORS 656.266(1); *Horizon Air Indus., Inc. v. Davis-Warren*, 266 Or App 388 (2014) (the claimant could prove a compensable injury without proving that work exposure "resulted in a specifically diagnosable medical condition"); *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (for initial claims, the claimant need not prove a specific diagnosis to prove a compensable injury); *Angelo Ioannou*, 70 Van Natta 117, 122 (2018) (a physician's opinion that the work injury was a precipitating cause of the claimant's need for medical treatment was sufficient to meet a "material cause" standard). Moreover, SAIF's "material cause" concession was not phrased in terms of a specific condition, the parties did not agree to litigate a specific condition, and the court determined that the "combined condition" asserted by SAIF in its "combined condition" compensability defense did not exist. Thus, we remand the claim to SAIF for processing according to law.

Because claimant has prevailed over SAIF's denial concerning her December 2014 injury claim after remand, she is entitled to attorney fees for her counsels' services at the hearing level, on review, before the court, and before the Board on remand for that issue.<sup>3</sup> ORS 656.386(1); ORS 656.388(1). In addition to the contingent fee granted for services before the court, claimant's attorneys request \$101,430 for services performed at the hearing level and on Board review for 225.4 hours of work, and a reasonable attorney fee award for services on remand.<sup>4</sup> SAIF responds that \$21,000 constitutes a reasonable assessed attorney fee for claimant's counsel's services at the hearing level and on Board review, but does not object to claimant's appellate counsel's requested fee for "wrap-up" services performed before briefing on remand or for an additional "reasonable" fee concerning services performed during the "remand" briefing process.<sup>5</sup>

In determining a reasonable attorney fee award, we apply the factors set forth in OAR 438-015-0010(4) to the circumstances of each case. *See Schoch v. Leopold & Stevens*, 325 Or 112, 118-19 (1997). Those factors are: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the necessity of allowing the broadest access to attorneys by injured workers; (8) the fees earned by attorneys representing the insurer/self-insured employer, as compiled in the Director's annual report under ORS 656.388(7) of attorney salaries and other costs of legal services incurred by insurers/self-insured employers pursuant to ORS Chapter 656; (9) the risk in a particular case that an attorney's efforts may go uncompensated; (10) the contingent nature of the practice of workers' compensation law; (11) the assertion of frivolous issues or defenses; and (12) claimant's counsel's contingent hourly rate, if asserted, together with any information used to establish the basis on which the rate was calculated.<sup>6</sup>

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<sup>3</sup> The court awarded a contingent attorney fee for services before the court.

<sup>4</sup> Claimant retained the same counsel for the hearing level and on Board review. However, claimant retained separate counsel for services before the court and before the Board on remand.

<sup>5</sup> On remand, claimant's counsel submitted a statement of services totaling \$3,465 pertaining to 7.7 hours of "wrap-up" work performed prior to the scheduling and submission of remand briefing, which included a contingent hourly rate of \$450.

<sup>6</sup> We are not required to make findings for each rule-based factor. *See Weyerhaeuser Co. v. Fillmore*, 98 Or App 567, 571 (1989) (Board not required to make findings as to each rule-based factor regarding a reasonable attorney fee award, but Board's explanation must be detailed enough to establish a reasonable basis for its decision).

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## Hearing and Board Review

Here, claimant's hearing and Board review level counsel submitted a fee request of \$101,430, based on 211.4<sup>7</sup> reported hours and a proposed \$450 contingent hourly rate. Under such circumstances, we would typically use this information as a starting point for awarding an attorney fee based on the rule-based factors for those levels. *Karista D. Peabody*, 73 Van Natta 244, *recons*, 73 Van Natta 362 (2021). However, for the following reasons, we decline to perform a *Peabody* analysis.

The statement of services does not delineate between the different issues litigated at the hearing level, and claimant prevailed on only one of several issues litigated. Specifically, claimant has prevailed only on the issue of the December 2014 injury claim denial. Yet, at the hearing level, claimant also litigated: (1) new/omitted medical condition claim denial for left L5 radiculopathy and an L4-5 herniated disc related to a November 5, 2013, date of injury; (2) an aggravation claim related to a November 5, 2013, injury claim; (3) the causal relationship between a proposed left L5-S1 laminectomy for nerve root decompression and a November 5, 2013, injury claim; and (4) an occupational disease denial for low back conditions. As noted in footnote seven, claimant's counsel also deducted 10 hours of work related to an unrelated Order on Reconsideration issue.

However, the statement of services does not explain which services are related to which issues. Moreover, many line items combine several services that are difficult to parse out. Under such circumstances, determining the reasonableness of the overall reported hours for claimant's counsel's services is difficult, and we ultimately are unable to evaluate each service to determine reasonableness or potential excessiveness. *See, e.g., Chauntelle A. Olson*, 73 Van Natta 583, 598 n 10 (2021) (hours for record review, legal research, and briefing was considered excessive where many time entries concerning these tasks included multiple tasks and were difficult to evaluate for time spent on each task).

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<sup>7</sup> Claimant's counsel filed a statement of services that detailed 235.4 hours of work, but only requested 225.4 hours after a line item deduction of 10 hours for "estimated time devoted to Order on Reconsideration." Claimant's counsel did not otherwise detail which services were related to the closure issue on which claimant did not prevail. Moreover, claimant's counsel withdrew 14 hours of services that were performed before the issuance of the December 2014 injury claim. Thus, the total reported hours are 211.4.

Accordingly, although we have considered claimant's counsel's fee submission, including the hours reported and the proposed contingent rate in our analysis of the factors, we decline to use those numbers as a starting point for our analysis. Thus, we analyze the factors in OAR 438-015-0010(4).

Initially, we note that claimant's counsel's \$101,430 attorney fee request greatly exceeds even the high end of fee requests for services at the hearing level and on review. *See, e.g., Olson*, 73 Van Natta at 1072 (stating that the Board considered a \$20,000 fee request to be on the high end of fee requests for services solely at the hearing level); *Christopher L. Garrett, DCD*, 72 Van Natta 880 (2020) (modifying the ALJ's \$42,000 attorney fee award and awarding a \$60,000 attorney fee for the claimant's counsel's services solely at the hearing level). Moreover, because we interpret the fee submission to be based on hours at the hearing level and Board review for services related in part to issues on which claimant did not prevail, the request necessarily includes services for issues in which claimant is not entitled to a fee award.

Next, we address the nature of the proceedings and the time spent on the case. The hearing lasted 1 hour and 38 minutes (which we consider to be average in length), with claimant as the only witness. The transcript for the hearing totals 49 pages. Written closing arguments, which took place on a much later date, included SAIF's opening brief (13.5 pages, 6 pages of which pertained to the denial at issue, in addition to a detailed summary of the exhibits), claimant's respondent's argument (5 pages, 2 pages devoted to the prevailing issue), and SAIF's reply argument (3 pages, 1 page due to the prevailing issue). It is reasonable to assume that claimant's counsel prepared for the hearing and conducted research regarding the written closing arguments. The record contains 107 exhibits, including two physicians' reports generated by claimant's counsel (that, in part, assisted in setting aside SAIF's October 20, 2015, denial).<sup>8</sup> (Exs. 74A, 83).

Moreover, claimant's counsel participated in three substantial depositions of SAIF's specialists that pertained, in part, to the compensability of the December 2014 work injury: 67 pages (lasting 1 hour 23 minutes); 56 pages (lasting 1 hour 8 minutes); and 53 pages (lasting 1 hour 20 minutes). (Exs. 85A, 86, 87). Again, we assume that claimant's counsel prepared for the depositions. Thus, claimant's

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<sup>8</sup> We did not include claimant's counsels preparation and drafting of a February 17, 2015, letter to Dr. Dorsen or his February 23, 2015, letter to Dr. Takacs because they concerned claimant's 2013 injury claim, rather than the 2014 injury claim. (Exs. 63, 64).

counsel's services reasonably included time spent at the hearing, time performing hearing preparation and claim investigation, and time spent garnering evidence. *See Bowman v. SAIF*, 278 Or App 417 (2016); *John V. Rocks, Jr.*, 68 Van Natta 1799, 1800 (2016).

The nature of the proceedings at the hearing level and on Board review was complicated by the procedural posture of the case. SAIF presented and developed evidence concerning a "combined condition" defense. In doing so, it presented numerous, extensive opinions from Drs. Hammel and Rosenbaum. Moreover, as noted above, there were several issues litigated concerning the low back on which claimant did not ultimately prevail, but some of the evidence developed overlaps the compensability dispute on which she prevailed. Finally, there were pre-hearing representations, including SAIF's last-minute concession of "material cause" and claimant's counsel's response to that position.

Claimant's counsel necessarily reviewed the ALJ's 18-page order (part of which related to the issue on which claimant prevailed) and requested Board review. At the Board review level, claimant's counsel submitted an 8-page appellant's brief (of which approximately 6 pages related to the December 2014 injury claim) and a 2-page reply brief, the substance of which was not particularly enlightening as to the medical evidence. SAIF's respondent's brief was approximately 10 pages, with 3.5 pages devoted to this initial injury claim. Claimant's counsel on Board review (the same counsel who represented claimant at the hearing level) represented that he devoted 23 hours to review the record, prior closing arguments, the ALJ's order, and to draft claimant's appellant's and reply briefs. In our view, notwithstanding the two briefs involved, the amount of time spent by claimant's appellate counsel in his efforts on review was unwarranted, particularly for a seasoned practitioner. Furthermore, claimant's briefs, which focused in material part on several unrelated legal issues, were not of particular assistance in resolving the disputed issues on review.

Considering the range of disputed claims generally submitted for resolution to this forum, the compensability issue on which claimant prevailed was of average complexity. Turning to the value of the interest involved and benefits secured for claimant, claimant's initial injury claim for a low back condition will now be accepted, which will provide an array of benefits.

The disagreement between medical experts in this case, taken together with the fact that claimant did not prevail at the hearing and board review levels, created a risk that claimant's hearing/Board review counsel's efforts might go

uncompensated given the contingent nature of the practice of workers' compensation law. The risk of going uncompensated in this particular case was higher because, as a general proposition, it is less likely that an attorney for an injured worker will prevail over a carrier's denial and receive a carrier-paid attorney fee award when the worker did not prevail at the hearing level. *Lloyd R. Fleming*, 73 Van Natta 1006, 1015 (2021).

Claimant's counsel has been a member of the Oregon State Bar for 46 years, and opposing counsel for SAIF each had over 30 years of experience at the time of the hearing and on review.

In conclusion, after considering claimant's counsel's fee submission, SAIF's response, and applying the factors set forth in OAR 438-015-0010(4) to the particular circumstances of this case (as analyzed and assessed above), we find that a reasonable attorney fee for claimant's attorney's services at the hearing level and on Board review is \$21,000.

#### Services on Remand

On remand, claimant's appellate counsel requests a reasonable attorney fee award for services performed at that level. Specifically, claimant's counsel requests a \$3,465 attorney fee for services related to "wrap-up" time and preparing a fee petition that preceded claimant's briefing on remand, based on 7.7 reported hours and a proposed \$450 contingent hourly rate, in addition to services for briefing on remand. SAIF does not object to the proposed fee for the "wrap-up" services, and we find the fee request for those services to be reasonable.

Turning to claimant's request for a reasonable fee for her services pertaining to briefing on remand, claimant's counsel's opening brief on remand was 4 pages, and her reply brief was 25 pages with attachments (in response to SAIF's 13-page respondent's brief with attachments). Her summary of facts, arguments, and citations to relevant case law were helpful to the resolution of the disputes concerning the compensability determination of the December 2014 injury claim, as well as the attorney fee amounts. She clarified the legal standard for the compensability of claimant's injury claim, provided concise arguments regarding medical causation, and directly responded to SAIF's arguments.

At the time of the remand process, claimant's counsel had been a member of the Oregon State Bar for 33 years. Her briefs on remand reflect her skill and expertise in workers' compensation law and appellate litigation. SAIF's

concession regarding the compensability of the dispute reduced the likelihood that claimant's counsel would go uncompensated. The benefit to the worker, as noted above, is an accepted injury claim.

Based on the above factors, we find \$8,465 to be a reasonable attorney fee award for claimant's counsel's services on remand.

In sum, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's counsels' services at the hearing level, on Board review, and on remand is \$29,465, to be paid by SAIF.<sup>9</sup>

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of claimant's December 2014 low back injury claim, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

Accordingly, on remand, in lieu of the Board's February 7, 2019, order, we reverse that portion of the ALJ's order that upheld SAIF's denial of claimant's December 2014 denial of claimant's low back injury claim. SAIF's denial is set aside and the claim is remanded to the insurer for processing in accordance with the law. For services at the hearing level, on Board review, and on remand, claimant's counsel is awarded \$29,465, to be paid by SAIF.<sup>10</sup>

### **IT IS SO ORDERED.**

Entered at Salem, Oregon on April 11, 2023

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<sup>9</sup> As noted above, claimant was represented by one attorney at the hearing level and on Board review and a different attorney on remand. Each attorney has submitted an individual fee request, all of which we have considered. We note, however, that the attorney fee award for services at the hearing level, on Board review, and on remand is granted to the attorney of record, with the specific distribution of that award to be resolved by claimant's current and former attorneys. *See Orlando M. Gongora*, 63 Van Natta 1003, *recons*, 63 Van Natta 1127 (2011).

<sup>10</sup> This fee is in addition to the attorney fee granted by the court.